

DISTRICT COURT OF GUAM

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ANTHONY AGULTO ASCURA,

Defendant.

Criminal Case No. 96-00029
Civil Case No. 98-00051

ORDER

Before the court is a Motion for Bail Pending Final Disposition of Rule 60(b)(4) Motion, filed on April 18, 2011 by Anthony Agulto Ascura (“the Petitioner”). Docket Nos. 68. He requests that the court release him on bail pending the final disposition of his Motion to Void Judgment Pursuant to Federal Rule 60(b)(4). *See* Docket No. 68.

The Petitioner cites 18 U.S.C. §§ 3142(b) and 3143, the Bail Reform Act of 1984. *See* Docket No. 68. However, these provisions do not apply to the Petitioner’s case; § 3142 addresses the release or detention of a defendant pending trial, and § 3143 addresses the release or detention of a defendant pending sentence or appeal. It is undisputed that the Petitioner is not pending trial, sentence or appeal; he is seeking post-conviction relief.

The Ninth Circuit has held: “The Bail Reform Act does not apply to federal prisoners seeking postconviction relief. Instead, Fed.R.App.P. 23 governs the issue of the release or detention of a prisoner, state or federal, who is collaterally attacking his or her criminal conviction.” *United States v. Mett*, 41 F.3d 1281, 1282 (9th Cir. 1994) (citations omitted).

1 Federal Appellate Procedure Rule 23, which addresses the custody or release of a prisoner
2 in a habeas corpus proceeding, states in relevant part:

3 (d) Modification of the Initial Order on Custody. An initial order governing the
4 prisoner's custody or release, including any recognizance or surety, continues in
5 effect pending review unless for special reasons shown to the court of appeals or the
Supreme Court, or to a judge or justice of either court, the order is modified or an
independent order regarding custody, release, or surety is issued.

6 Therefore, a prisoner must demonstrate “special reasons” to modify a custody order. Rule 23 “is
7 the same as Supreme Court 49,” which the Ninth Circuit examined in *Benson v. California*, 328
8 F.2d 159 (9th Cir. 1964). The court in *Benson* denied a convicted prisoner’s request to be released
9 on bail while his habeas corpus petition was pending. The prisoner was to be released from jail
10 within a few days, yet the court held: “It would not be appropriate for us at this stage of the
11 proceeding to enlarge this petitioner on bail even if we found that the allegations of his petition for
12 habeas corpus made out a clear case for his release. Something more than that is required before we
13 would be justified in granting bail.” *Id.* at 162.

14 Here, the Petitioner argues that he has a meritorious claim for relief in his Rule 60 motion,
15 and that if the court vacates his conviction on Count I pursuant to the Ninth Circuit’s decision in
16 *United States v. Cabaccang*, 332 F.3d 922 (9th Cir. 2003), then he should be released immediately.
17 *See* Docket No. 68. The Government contends, however, that even if Count I were vacated, the
18 Petitioner would not be immediately released, because he would still have to serve the sentence
19 imposed for Counts II and III. *See* Docket No. 70.

20 “Bail pending a decision in a habeas case is reserved for extraordinary cases involving
21 special circumstances or a high probability of success.” *Land v. Deeds*, 878 F.2d 318, 318-19 (9th
22 Cir. 1989). The Petitioner’s argument “presents no extraordinary statement or claims of fact outside
23 of the ordinary run of such petitions commonly filed in the federal court by . . . prisoners seeking
24 release on habeas corpus.” *Benson*, 328 F.2d at 160. Furthermore, even if Count I were vacated
25 pursuant with his Rule 60 motion, the Petitioner has not shown “a high probability of success” that
26 such *vacatur* of Count I would result in his immediate release from imprisonment. *Land*, 878 F.2d
27 at 318.

1 Accordingly, the Motion for Bail Pending Final Disposition of Rule 60(b)(4) Motion is
2 hereby **DENIED**. The court will hold a hearing on the Petitioner's Motion to Void Judgment
3 Pursuant to Federal Rule 60(b)(4) on September 28, 2011 at 2:30 p.m. The Petitioner is presently
4 imprisoned at USP Lompoc, California. The U.S. Marshal is hereby ordered to effectuate the return
5 of the Petitioner to this district, and shall transport the Petitioner to Guam in order that he is present
6 at the motion hearing.

7 **SO ORDERED.**



/s/ Frances M. Tydingco-Gatewood
Chief Judge
Dated: Aug 16, 2011